91-956

No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CHRISTOPHER GERDING, *et al.*,
Petitioners,

v.

REPUBLIC OF FRANCE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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December 4, 1991

QUESTIONS PRESENTED

1. What constitutes commercial activity having a "substantial contact" with the United States by a foreign state within the meaning of The Foreign Sovereign Immunities Act, 28 U.S.C. § 1003(e)(2) (1990)?

2. What constitutes an action "based upon" the commercial activity of a foreign state within the meaning of The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1990)?

PARTIES TO THE PROCEEDING BELOW

In addition to Christopher Gerding, Administrator of the Estate of Leslie Margaret Gerding, Deceased, the following parties were plaintiffs-appellants in the court of appeals: Christopher Gerding, Individually; Charles Christian Gerding, Individually; and Joan Fraser Gerding.

Defendants-appellees in the court of appeals were the REPUBLIC OF FRANCE; Ministere Des Postes Et Des Telecommunications Et de La Telediffusion; France Cables & Radio; Direction Des Telecommunications Sous-Marines; Direction Telecommunications Reseau Exterieur; Companie Francaise Des Cables Sous-Marines; N/C LEON THEVENIN, in rem in the Atlantic Ocean; Claude Voiry, M.D.; Atlantic Cable Maintenance Association, Jointly and Severally; Compania Telefonica National de Espana, a

corporation organized and existing under the laws of Spain, a/k/a CTNE, a/k/a Telefonica, and having its principal office at Madrid, Spain; Transoceanic Cable Ship Co.; American Telephone and Telegraph Company, Bell Labs; Bell Telephone Laboratories, Incorporation.

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CHRISTOPHER GERDING, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI

Christopher Gerding, Administrator of the Estate of Leslie Margaret Gerding, Deceased, et al.[1] (collectively, the Gerdings) respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit

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[1] Christopher Gerding, Individually; Charles Christian Gerding, Individually; and Joan Fraser Gerding.

in *Gerding v. Republic of France*, 943 F.2d 521 (4th Cir. 1991).

OPINIONS BELOW

The opinion of the court of appeals is reported at 943 F.2d 521 and is reproduced at Appendix ("App.") 1a. The order of the United States District Court for the District of Maryland, issued on October 25, 1990, is reproduced at App. 28a.

JURISDICTION

The judgment of the court of appeals was rendered on September 5, 1991. No petitions for rehearing have been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1990).

STATUTORY PROVISIONS INVOLVED

This case involves sections 1603 to 1605 of Title 28 of the United States Code, otherwise known as The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11 (1990), Pub. L. No. 94-583, §4(a), 90 Stat. 2892, App. 57a.

STATEMENT OF THE CASE

A. Posture of the Case

Petitioners seek review of a judgment of the United States Court of Appeals for the Fourth Circuit, affirming a decision of the United States District Court for the District of Maryland. The District Court, finding that the Defendants were

immune from suit under the Foreign Sovereign Immunities Act (FSIA), dismissed Plaintiffs' action seeking damages against the Republic of France and other French officials and agencies (collectively, Respondents) for the death of Leslie Gerding. The Fourth Circuit affirmed, concluding that 1) "commercial activity" was not established within the meaning of the FSIA, and 2) that, in any event, Plaintiffs' case was not "based upon" commercial activity within the meaning of the FSIA.

B. Nature of the Case

This action concerns the death of an AT & T/Bell Labs engineer, Leslie Gerding. Ms. Gerding died in late October of 1987 while aboard the N/C Leon Thevenin, a French ship which had been stationed off the Canary Islands. Ms. Gerding had been dispatched to the ship

as part of her transatlantic fiberoptic cable research for Bell Labs.

The seas off the Canary Islands are known to be very rough in late October. Ms. Gerding's trip was met with no exception. Soon after work began, a severe storm enveloped the ship. Waves between 30-45 feet rocked the ship, and winds between 56-63 knots buffeted the vessel. Ms. Gerding, a diabetic, became extremely seasick. Her seasickness induced vomiting, which in turn induced a condition known as diabetic ketoacidosis, a debilitating and sometimes fatal condition if left untreated. The medical personnel aboard the ship, including the ship's doctor, Dr. Claude Voiry, never diagnosed Ms. Gerding's condition, even after she was admitted to the ship's infirmary. Ms. Gerding's untreated condition progressively deteriorated, and

sometime during the early morning hours of October 28, 1987, she died.

Ms. Gerding had been sent to the Canary Islands by Bell Labs to recover undersea fiberoptic cable. Four years prior to the trip, AT & T had sold a fiber optic deep water cable system known as Optican 1 to the Compania Telefonica Nacional de Espana (Telefonica). AT & T agreed to install the system between Spain and the Canary Islands. Following the installation, Telefonica made Optican 1 part of the Atlantic Cable Maintenance Agreement (ACMA), a consortium of governments and companies that own or repair cables in the Atlantic Ocean. Among the ACMA participants are Telefonica, AT & T, and France Cables et Radio (FCR). The ACMA maintains the cable systems by assigning patrol ships to areas where repair work is required.

The N/C Leon Thevenin is one of these patrol ships. Each ship is individually owned by an ACMA participating country or company. The cable ships patrol the ocean and remain on standby until assigned to a repair mission. The ACMA participating ship performs the repair and bills the cable's owner.

Optican 1 failed because it was being attacked by sharks. Bell Labs--the research and development arm of AT & T--assigned Ms. Gerding to the project of developing shark-proof fiberoptic cable.

AT & T and Telefonica entered into an agreement whereby AT & T would install the new shark-proof cable and Telefonica would pay for the work performed by the cable ship. The N/C Leon Thevenin was the ship assigned by the ACMA to do the work. The N/C Leon Thevenin is wholly

owned by the FCR and is used solely for undersea cable maintenance and repair.

In July of 1987, AT & T held a meeting in its Morristown, New Jersey offices to discuss the Optican 1 repair mission. The "chef de mission" of the N/C Leon Thevenin, Jean Genoux, attended the meeting. Mr. Genoux failed to ask for any medical reports of AT & T or Bell Lab employees who were assigned to the mission. He also failed to inform AT&T that under French maritime regulations concerning registered seamen, insulin dependent diabetics are not allowed to work aboard vessels.

At the time of the New Jersey meeting, the N/C Leon Thevenin was on standby status in Wilmington, North Carolina. In September, the N/C Leon Thevenin was lifted from standby status and ordered to Newington, New Hampshire,

so that the new cable could be loaded onto the ship. After the cable was loaded, the ship was ordered to Covington, Maryland, where AT & T and Bell personnel loaded equipment, engineers and crew. The N/C Leon Thevenin then sailed to the Canary Islands.

Ms. Gerding flew to Europe in October of 1987 and boarded the N/C Leon Thevenin off the coast of the Canary Islands. It was the first time in her life she had been on an ocean-going vessel. As noted above, after the ship encountered very rough weather, Ms. Gerding became seasick. She was admitted to the ship's infirmary on October 27, 1987 and died the next morning. None of the ship's medical staff properly diagnosed her diabetic ketoacidosis or treated her with

insulin, even though the ship had supplies of insulin on board.

C. The Statutory Scheme

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-11 (1990), provides foreign governments and certain of their instrumentalities with limited immunity from suit in the United States. A court facing an immunity defense under the FSIA begins by determining whether the defendant qualifies as a "foreign state"[2] within the meaning of the

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[2]A "foreign state" is defined as follows:

> (a) A "foreign state," . . ., includes a political subdivision of a foreign state or any agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity --
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision

(continued...)

statute. The court then determines whether the particular defendant is entitled to immunity,[3] or whether the defendant instead falls under one of six general exceptions to immunity. The second exception provides that immunity is unavailable if the "action is <u>based upon</u> a commercial activity carried on in the United States." 28 U.S.C. §

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[2](...continued)

> thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a)-(b) (1990).

[3]The cornerstone provision of the FSIA reads,

> "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and if the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. §1604 (1990).

1605(a)(2) (1990) (emphasis added). "Commercial activity" means "either a regular course of commercial conduct or a particular commercial transaction or act." § 1603(d). "Commercial activity carried on in the United States by a foreign state" is further defined under the FSIA as "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e) (1990) (emphasis added).

The issues before this Court are (1) what constitutes commercial activity having a "substantial contact" with the United States by a foreign state within the meaning of the FSIA, and (2) what constitutes an action "based upon" a commercial activity carried on in the United States by a foreign state within the meaning of the FSIA?

D. Disposition of Courts Below

Respondents moved to dismiss the Gerdings' action pursuant to the FSIA. There had been no discovery as against the Respondents. The Respondent-French Defendants argued that each of them was an agency or instrumentality of the Republic of France and, therefore, immune from the jurisdiction of United States courts. They further argued that none of the exceptions listed in the FSIA applied in the instant case. The District Court of Maryland, per Judge Nickerson, agreed, and granted the Motion to Dismiss.

Judge Nickerson found that the Respondents were a "foreign state" within the meaning of the FSIA. He then found that Respondents had engaged in no "commercial activity" within the U.S. for FSIA purposes because Respondents' contacts were not "substantial" within

the meaning of 28 U.S.C. § 1603(e). He believed that Respondents' contacts within the U.S. were "both isolated and transitory," and did not even "establish 'minimum contacts' under a due process analysis."

The District Court then asked whether there was a sufficient "nexus" between the Respondents' commercial activity in the U.S. and Plaintiffs' claim. The Judge answered this question in the negative. The court perceived the New Jersey planning mission meetings as purely "technical meetings," in which the French Defendants had no duty to discuss the health and safety of the Bell Lab employees and AT & T personnel who were to be aboard the ship for the October mission. The Judge reached this conclusion without the benefit of any discovery as against the Respondents.

The Fourth Circuit affirmed the district court's dismissal of the case. The court of appeals first addressed the question of whether the district court abused its discretion by ruling on the Motion to Dismiss without any discovery having been conducted against the Respondents. The appeals court concluded that, under the circumstances, the trial court did not abuse its discretion by granting the Motion to Dismiss. The court noted, "[t]he Gerdings did conduct extensive discovery of the domestic defendants, and through that discovery learned about the relevant circumstances surrounding Leslie Gerding's death." 923 F.2d 521, 524 (emphasis added). Discovery as to the domestic defendants, and the French Defendants' own declarations and affidavits, according to the court, made apparent the nature of

the French Defendants' participation in the mission. Id.

The court of appeals then turned its attention to the application of the FSIA to the facts. The first issue was whether all the Respondents fit the definition of a foreign state. According to the court, the Gerdings failed in persuading that this finding was in error, id. at 525, even though further discovery may have brought this conclusion into question.

The court then determined whether the foreign Respondents had fallen within the FSIA's "commercial activity" exception. The court affirmed the district court's finding that the Respondents' commercial activity was both "isolated and transitory," and thus not "substantial" within the meaning of 28 U.S.C. Section 1603(e). Id. at 527.

The Gerdings relied, inter alia, on the following commercial activities to bring the Respondents under the commercial activities exception: (1) the chef de mission Jean Genoux's presence at the July, 1987 planning meeting in Morristown, New Jersey; (2) the N/C Leon Thevenin's presence at the Wilmington, N.C. port; (3) the loading of cable onto the N/C Leon Thevenin at AT & T's facility in Newington, New Hampshire; (4) the N/C Leon Thevenin's presence at Port Covington, Maryland; and (5) commercial contracts the N/C Leon Thevenin must have entered into while it was docked at Wilmington and at other U.S. ports. Id. The court's decision not to find these activities "substantial" is summarized in the following paragraph:

> Genoux's attendance at the New Jersey meeting and the activities of the N/C Leon Thevenin were in furtherance of the ACMA and the

> particular mission that AT & T was undertaking for Spain's Telefonica. It was not the French defendants' commercial decision to use the N/C Leon Thevenin in the United States; rather the ship was in Wilmington only because that was the zone assigned to it by the ACMA. Genoux's attendance at the New Jersey meeting is insufficient to show substantial commercial activity of the French defendants within the United States, because the meeting apparently concerned planning a mission by the ACMA to repair a Spanish cable on the high seas. The actual commercial activity being planned was not going to take place in the United States.
>
> 943 F.2d at 527.

The court continued that, even if the Respondents' commercial activity was "substantial," the Gerdings' claim was not "based upon" that activity. The Fourth Circuit equated section 1605(a)(2)'s "based upon" requirement with a "nexus" requirement. The court's reasoning may be summarized as follows:

> The Gerdings contend that Genoux's attendance at the New

> Jersey meeting and his failure to ask for medical records of Bell Labs employees was directly connected to their cause of action against the French defendants. However, the Gerdings can point to no matters of record suggesting that Genoux had any duty or obligation to ask for medical records at all, or that the New Jersey meeting would have been the place to ask for such records. Apparently, this meeting was held to plan the technical aspects of the upcoming mission. The Gerdings have not shown that this meeting had a material connection with Leslie Gerding's death.
>
> Id.

Finally, the court concluded that any commercial contracts the N/C Leon Thevenin may have entered into while present in U.S. waters had no material connection with the Gerdings' cause of action. In sum, the court held that Respondents were entitled to immunity under the FSIA because they had not engaged in sufficient commercial activity in the U.S. and because, in any event,

the Gerdings' claim was not sufficiently connected with that activity.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT CONFLICTS WITH OTHER FEDERAL CIRCUITS THAT HAVE ADDRESSED THE IDENTICAL QUESTIONS

This Court's resolution of the underlying issues would resolve significant division in the courts below by (1) clarifying what constitutes commercial activity having "substantial contact" with the United States by a foreign state within the meaning of 28 U.S.C. section 1603(e) (1990), and by (2) clarifying what is an "action based upon a commercial activity carried on in the United States by [a] foreign state" within the meaning of 28 U.S.C. section 1605(a)(2) (1990). The cases currently available for review reflect confusion and inconsistency on the part of the

courts as they have wrestled with these questions over the years.

A. The Fourth Circuit Court's Interpretation of what Constitutes Commercial Activity Having "Substantial Contact with the United States" Cannot be Reconciled with Other Federal Courts' Interpretations of the Same Provision.

What constitutes "substantial contact" with the United States within the meaning of the FSIA naturally will turn largely on the individual facts and circumstances of each case. If anything can be gleaned from available case law, however, it is that the requirement is easily satisfied. See, e.g., *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1533 (11th Cir. 1991) (recruitment and hiring of single hospital employee in United Stats by Saudi Arabia through independent American corporation satisfied "substantial contact" requirement),

petition for cert. filed, 59 U.S.L.W. 2532 (U.S. Sep. 26, 1991) (No. 91-522) (Solicitor General invited to file brief, Nov. 18, 1991 (per curiam)); *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983) (noting "substantial contact" can be met by as little activity as receiving financing from U.S. private or public lending institution) (citations omitted); *In re Sedco, Inc.*, 543 F. Supp. 561, 565 (S.D. Tex. 1982) (where foreign nation enters into world market place to purchase or sell goods, it has engaged in commercial activity for FSIA purposes); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981) (substantial contact satisfied where manufacturer of allegedly defective pistol intended to make the pistol dealer his salesman); *Maritime Int'l Nominees*

Establishment v. Republic of New Guinea, 505 F. Supp. 141, 143 (D.D.C. 1981) (two meetings held in U.S., defendant's direction of activities of shipping group, and ambassador's several business-oriented contacts "more than sufficient" to constitute substantial contact); see also *Jones v. Shipping Corp. of India, Ltd.*, 491 F. Supp. 1260 (E.D. Va. 1980) (motion to dismiss for lack of subject matter jurisdiction denied where alleged personal injury occurred aboard ship acting in commercial capacity); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 395 (D. Del. 1978) (definition of commercial activity broad and sweeping). The common denominator of these cases is that the purpose of any individual activity is irrelevant in determining its commercial character. 28 U.S.C. § 1603(d) (defining "commercial activity")

(quoted with approval in *United Euram v. U.S.S.R.*, 461 F. Supp. 609, 610 (S.D.N.Y. 1978)). The court below's decision, however, represents a radical departure from these cases. *See Gerding*, 943 F.2d 521, 527 (Apparently, [the New Jersey] meeting was held to plan the technical aspects of the upcoming mission.") (emphasis added).

B. The Circuit Court's Interpretation of what Constitutes an Action "Based Upon" the Commercial Activity of a Foreign State within the Meaning of FSIA Conflicts with Other Federal Circuit Courts' Interpretations of the Same Provision.

An immunity defense under the FSIA very often implicates section 1605(a)(2)'s commercial activities exception. *See generally* 59 A.L.R. Fed. 99, § 2a (1986) ("A large number of those cases involving claims that a foreign state is not immune to federal

jurisdiction are based upon the commercial activities exceptions. . .."). Unfortunately, the commercial activities exception to the FSIA has also been its most problematic provision. *See* Michael W. Gordon, *Foreign State Immunity in Commercial Transactions*, § 10.01 (1991) [hereinafter Gordon] ("[A]sk even the most knowledgeable expert to define 'commercial activity' and the response will be filled with variations on the statutory theme to such a degree that one may dream of earlier times, when courts discouraged litigation against foreign states by application of an absolute theory."). In fact, there is a salient division among the circuits with regard to what constitutes an action "based upon" a foreign state's commercial activity.

At least three circuit courts of appeals have adopted an arguably liberal view of what is an "action based upon the commercial activity carried on in the United States by [a] foreign state." 28 U.S.C. § 1605(a)(2) (1990). *See, e.g., Nelson v. Saudi Arabia*, 923 F.2d 1528, 1534 ("Judicial authority reveals that a claim is 'based upon' the commercial activity of a foreign state when there is a 'jurisdictional nexus' between the acts for which damages are sought, and the foreign sovereign's commercial activity.") (citations omitted), *petition for cert. filed*, 59 U.S.L.W. 2532 (U.S. Sep. 26, 1991) (No. 91-522) (Solicitor General invited to file brief, Nov. 18, 1991) (per curiam)); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988) (there must be "connection" between commercial activity

and act complained of); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981) (immaterial that act complained of took place outside United States, because under section 1605(a)(2) alleged misconduct does not have to occur in this country if claim arises out of course of commercial activity here) (citation omitted).

On the opposite extreme, at least three other circuits have assumed a rigid posture with respect to what are claims "based upon" commercial activity under the FSIA. *See, e.g., Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("We conclude that a claim is 'based upon' events in the United States if those events establish a legal element of the claim."); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) ("emphasis should be on the

elements of the cause of action itself" in determining whether action "based upon" the foreign state's commercial activity); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1985) (jurisdiction present if plaintiff shows conduct in the United States that would be "an element of the cause of action under whatever law governs his claims") (emphasis added). The Fourth Circuit below appears to have adopted a mid-ground position, opining that the commercial activity need not be "direct," but "must be material." *Gerding*, 943 F.2d at 527 (quoting *Stena Rederi AB v. Comision de Contrates del Comite*, 923 F.2d 380, 387 (5th Cir. 1991)). Decisions representing all three views have been decided in the past year. *Gerding*, 943 F.2d 521; *Santos*, 93 F.2d 890; *Nelson*, 923 F.2d 1528.

Both private parties and foreign nations are expending tremendous resources litigating the very issues presented in this petition. By granting the petition and resolving these questions, this Court will be able to offer guidance to the lower courts with respect to, first, what constitutes commercial activity having "substantial contact" with the United States by a foreign state and, second, what constitutes an action "based upon" that commercial activity. This Court's guidance will help to remove an ever-increasing number of related cases from the dockets of federal courts and will also resolve circuit splits over the FSIA's proper interpretation.

II. THE QUESTIONS PRESENTED ARE OF SIGNIFICANT NATIONAL AND INTERNATIONAL IMPORTANCE

This case goes to the core of an important question of international law: what level of commercial activity will subject a foreign state, or an organ of a foreign state, to suit in United States federal courts? A prominent international lawyer recently said, "[t]he commercial activity exceptions in the FSIA constitute the heart of the Act. There would have been no FSIA had the belief not developed over the past century that foreign states engaging in commerce should be denied their traditional absolute immunity from jurisdiction." *Gordon, supra*, at § 10.01. There are few, if any, foreign states whose stream of international commerce does not flow into or out of the United States. An ever-growing global

marketplace transports American citizens across international waters, through international airspace, and onto international soil. The proper interpretation of the FSIA thus directly and substantially affects all American citizens travelling or working abroad. The FSIA's proper interpretation equally impacts upon all foreign states engaged in commercial activity within the United States.

Likewise, the resolution of what constitutes an action "based upon" a foreign state's commercial activity has both national and international ramifications. The division among the circuits regarding this issue has injected an element of uncertainty into the resolution of claims brought by U.S. citizens against foreign states. Uniform application of the Act is necessary to

avoid possible forum-shopping, and to instruct courts as to how and when parties can maintain lawsuits against foreign states.

The instant petition provides the Court with an opportunity to determine, first, the level of commercial activity necessary to subject a foreign state to a lawsuit in the United States, and, second, the relationship necessary between a nation's commercial activity and the grievance complained of.

III. THE COURT BELOW ERRONEOUSLY DECIDED THE ISSUES PRESENTED TO THIS COURT.

A. The Respondents' Commercial Contact Within the United States was Substantial

The FSIA provides, "commercial activity carried on in the United States" means "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. §

1603(e) (1990) (emphasis added). "Substantial Contact" is not a defined term. Congress has accordingly left it to the courts to infuse the phrase with meaning. The Act's legislative history does offer guidance, however, as to what constitutes "substantial activity." The House Report's section-by-section analysis of the Act notes, "[a]ctivities such as a foreign government's sale of a service. . . would be among those included in the definition [of 'commercial activity']." H.R. Rep. No. 1987, 94th Cong., 2d Sess. 16 (1976) [hereinafter *House Report*] (emphasis added). The House Report further defines "substantial contact" as including "cases based on commercial transactions performed in whole or in part in the United States." House Report, at 17 (emphasis added); *see also Ministry of*

Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80, 89 (2d Cir. 1980) (noting how "little activity" can satisfy "substantial contact" requirement) (citations omitted).

Finally, both the express language of the FSIA and its legislative history underscore the importance of looking to the nature of the activity rather than to its purpose in determining whether the activity is "commercial." 28 U.S.C. § 1603(d) (1990) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose"); Jurisdiction of U.S. Courts in Suits Against Foreign States, Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Committee on the

Judiciary, 94th Cong., 2d Sess. 27 (specifically referring to nature rather than purpose test) (remarks of Mr. Monroe Leigh, Legal Advisor to the Department of State).

The Gerdings provided the lower court with a catalogue of known contacts by the Respondents with the United States. Indeed, the District Court identified at least nine of these contacts. *See* App. at 48a. This catalogue indexed the activities of the French Chef de Mission's planning meetings at AT&T's New Jersey headquarters; the activities of the N/C Leon Thevenin in several U.S. ports of call and U.S. waters; and the cooperative efforts between Bell Labs employees and the crew of the N/C Leon Thevenin both in the U.S. ports of call and off the Canary Islands.

The catalogued activities were commercial in nature. 28 U.S.C. § 1603(d) (emphasis added). Further, they illustrate commercial conduct "performed in whole or in part in the United States," *See House Report*, at 17 (emphasis added), and are, therefore, "substantial". Id. It is thus immaterial, as the Fourth Circuit wrote, that "[t]he actual commercial activity being planned was not going to take place in the United States." *Gerding*, 943 F.2d at 527.

The repair and maintenance of fiberoptic transatlantic undersea cable undoubtedly "substantially" contacts the United States. The N/C Leon Thevenin, through its participation in the ACMA, sold a repair and maintenance service having a substantial contact with the United States. *See House Report*, at 16.

The Respondents availed themselves of the protection and benefits of American law in many ways. The lower court, therefore, erred in not finding that Respondents had substantial commercial contact with the United States.

B. Petitioners' Claim is Based Upon Respondents' Commercial Activity

The FSIA provides that a foreign state will not enjoy a shield of jurisdictional immunity from the federal courts in actions "based upon a commercial activity carried on in the United States by the foreign state..." 28 U.S.C. § 1602(a)(2) (1990) (emphasis added). As discussed above, the various circuits have split over what this provision means. Some believe it means that the commercial events in the United States must form an element of the plaintiff's claim, *see, e.g., Santos v.*

Compagnie National Air France, 934 F.2d 890, 892 (7th Cir. 1991) (emphasis added), while others believe it means there must only be a "nexus" between the commercial events occurring in the United States and the act complained of, which may occur extraterritorially. *See, e.g. Nelson v. Saudi Arabia*, 923 F.2d 1528, 1534 (11th Cir. 1991). The Fourth Circuit below remarked that although the causal connection need not be "direct," it must be "material." *Gerding*, 943 F.2d at 527 (citation omitted).

Whatever interpretation is chosen by this Honorable Court, the Gerdings must prevail. First, the Gerdings allege that the Respondents owed a duty to request Leslie Gerding's medical records and to inform her that, as a diabetic, French law prohibited her from boarding the N/C Leon Thevenin. Naturally, the duty had

to be satisfied before Ms. Gerding boarded the ship; it could only have been satisfied through the Chef-de-Mission Genoux's contacts with Bell Labs in the United States. Therefore, the Respondents' commercial activities in the U.S. form an element of the Gerdings' claim. *See Santos*, 934 F.2d at 892.

Second, a nexus exists between the death of Ms. Gerding and Respondents' commercial activities in the United States. Mr. Genoux came to the United States for the express purpose of discussing his principals' participation in the cable repairs. Moreover, it was the only meeting held to plan the fall cable laying and repair mission. Therefore, the lower court's persistent labeling of this meeting as merely a "technical" meeting is without foundation in the record. In addition, the N/C Leon

Thevenin was berthed for an extended period of time in the United States--in Wilmington, N.C., Newington, N.H., and Port Covington, MD. Presumably, the ship entered into contracts with U.S. companies for purchases of supplies and services while berthed at U.S. ports of call. "But for" these activities, Ms. Gerding would not have been aboard the N/C Leon Thevenin when she died. A "nexus" therefore exists between the Respondents' commercial activities in the U.S. and the Gerdings' claim. *See Nelson*, 923 F.2d at 1534.

Third, the nexus between the Gerdings' claim and the Respondents' commercial activities is "material." *Gerding*, 943 F.2d at 527. "But for" Respondents' failure to obtain pertinent medical information and medical records regarding Leslie Gerding, while engaged

in commercial activity in the United States which directly led to Respondent's subsequent failure to properly diagnose Ms. Gerding's diabetic ketoacidosis, Ms. Gerding would not have died. Thus, a material nexus exists between the commercial activities of Respondents and the death of Ms. Gerding. The lower court's interpretation of the nexus requirement is too narrow, in direct conflict with the interpretation of other circuits, and in clear contravention of the intent of Congress in enacting the FSIA.

CONCLUSION

For the reasons stated herein, a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be issued and the case set for primary review.

Respectfully submitted,

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December 4, 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2503

CHRISTOPHER GERDING, Administrator
the Estate of Leslie Gerding,
Deceased and CHRISTOPHER GERDING,
Individually, et al

Plaintiffs-Appellants

VS.

REPUBLIC OF FRANCE, et al

Defendants-Appellees

and

TRANSOCEANIC CABLE SHIP CO., et al

Defendants

OPINION

PHILLIPS, Circuit Judge:

The personal representatives and survivors of Leslie Gerding (collectively, the Gerdings) appeal the district court's dismissal of their action seeking damages for the death of

Leslie Gerding against the Republic of France and other French officials and agencies (hereinafter "French defendants")[1] on the grounds of immunity under the Foreign Sovereign Immunities Act (FSIA). The Gerdings claim that the district court should have allowed discovery before ruling on the motion to dismiss, and that in any event the record does not support the court's conclusion

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[1]The French defendants include: The Republic of France, the Ministere des Postes et des Telecommunications et de la Telediffusion (now designated the Ministere des Postes, des Telecommunications et de l'Espace), the Direction des Telecommunications du Reseau Exterieur, the Direction des Telecommunications Sous Marines, France Cables et Radio, S.A., the Compagnie Francaise des Cables Sous Marines (now the Compagnie Generale des Communications, S.A. ("COGECOM")) and the N/C Leon Thevenin. The Gerdings also named AT&T, Bell Labs, and Transoceanic Cable Ship Company, Inc. as defendants. The Gerdings settled with these three defendants. The remaining defendants, who are not involved in the present appeal, are Claude Voiry, M.D.; the Atlantic Cable Maintenance Association (ACMA); and Compania Telefonica Nacional de Espana, a/k/a CTNE (Telefonica).

that the French defendants are immune to suit. Because the Gerdings failed timely to seek discovery and because the district court did not err in finding immunity under the FSIA, we affirm.

I

In 1983, AT & T sold Optican 1, an undersea fiber optic deep water cable system to the Compania Telefonica Nacional de Espana (Telefonica). Under the sales contact, AT & T agreed to install the Optican 1 cable between Spain and the Canary Islands. In 1985, Telefonica made Optican 1 part of the Atlantic Cable Maintenance Agreement (ACMA). The London-based ACMA consists of governments and companies that own or repair cables in the Atlantic Ocean. Telefonica, AT & T, and France Cables et Radio (FCR) all participate in the ACMA. The ACMA takes care of cable maintenance

requests by matching the requests with available "cable ships," including the N/C Leon Thevenin, vessels which specialize in repairing cables. Each "cable ship" is individually owned by an ACMA-participating country. The ACMA assigns the ships to geographical zones where they stay on standby until they are assigned to a repair mission. When a cable ship is assigned to a repair job, ACMA bills the cable owner requesting the repair.

As it turned out, Optican 1 failed because it could not withstand shark bites. AT & T then asked Bell Labs, its research and development organization, to manufacture a cable that would be protected from fish bites. Leslie Gerding, a Bell Lab employee, was assigned to this project. AT & T made an agreement with Telefonica pursuant to

which AT & T would install the new cable and Telefonica would pay the bill for the cable ship assigned by the ACMA. The ACMA assigned the French vessel, the N/C Leon Thevenin, for this mission. The N/C Leon Thevenin is wholly owned by FCR and is used only for undersea cable maintenance and repair.

In July, 1987, AT & T held a meeting to discuss the Optican 1 repair mission at its New Jersey offices. Jean Genoux, the "Chef de Mission" of the N/C Leon Thevenin Optican 1 mission attended this meeting. At this time, the N/C Leon Thevenin was on standby status in Wilmington, North Carolina. In September 1987, the ACMA released the N/C Leon Thevenin from standby status and called it to Newington, New Hampshire, so that the new cable could be loaded. From there, the vessel proceeded to Port

Covington, Maryland, where AT & T and Bell Lab personnel loaded equipment, engineers, and crew. The N/C Leon Thevenin then sailed to the Canary Islands to complete its mission.

Leslie Gerding boarded the N/C Leon Thevenin in October 1987 when the boat was anchored off the coast of the Canary Islands. She did not tell the captain, the chef de mission, or other ship personnel that she was diabetic. During its mission, the ship encountered rough weather and Gerding became very seasick. ON October 27, 1987, Leslie Gerding was admitted to the ship's infirmary. Early the next morning, Leslie Gerding died.

The Gerdings then brought this action against the French defendants alleging their liability for Leslie Gerding's death under the Jones Act, the Death on the High Seas Act, and the general

maritime law of unseaworthiness. The basic theory of the claim against the French defendants was that chef de mission Genoux should have told AT & T representatives at the New Jersey meeting that he needed the medical records of Bell Lab employees who would be aboard the N/C Leon Thevenin; and that in consequence of his negligent failure to do so, Leslie Gerding's condition was not known and resulted in inadequate treatment on board the N/C Leon Thevenin. As indicated, the district court dismissed the action as to the French defendants on the basis that they were immune under the FSIA.

This appeal followed.

II

The Gerdings first contend that the district court abused its discretion by ruling on the French defendant's motion

to dismiss without any discovery having been conducted against those defendants. Specifically they contend that the district court's ruling on immunity was premature, given that they had not conducted discovery on such issues as whether certain French defendants were really instrumentalities of the French government, whether there were any more contacts between the French defendants and the United States, and the nature of Jean Genoux's responsibilities both at the New Jersey meeting and on board the N/C Leon Thevenin.

However, the Gerdings never sought discovery against the French defendants in the district court. This is not a case where the district court arbitrarily denied plaintiffs' discovery requests; rather the district court proceeded to rule on the motion to dismiss without any

discovery efforts or requests having been made. Although the Gerdings acknowledge that they did not request any discovery in the district court, they claim that the record did not contain sufficient information for the district court to rule on the FSIA issue. The Gerdings contend that under these circumstances, justice requires that we should remand the case to the district court to permit them to make the discovery they identify as critical to ruling on the immunity disease. We disagree.

In Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976), the Supreme Court made the point critical to the fair conduct of adversarial proceedings that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." 428 U.S.

at 120, 96 S.Ct. at 2877. And we have held in furtherance of that critical principle of our litigation system, that "[q]uestions not raised and properly appealed in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances." Although the Gerdings deny the French defendants' suggestion that the Gerdings did not seek discovery because they thought the record was sufficient as it stood to withstand an FSIA defense, they do not offer any alternative explanation for their failure to pursue any discovery against the French defendants. The Gerdings did conduct extensive discovery of the domestic defendants, and through that discovery learned about the relevant circumstances surrounding Leslie Gerding's death. The nature of the French defendants' participation in the

missions during which Leslie Gerding died was apparent from the record developed through discovery of the domestic defendants and the French defendants' own declarations and affidavits.

We conclude that under these circumstances, the district court did not abuse its discretion by ruling on the French defendants' motion to dismiss in the absence of any discovery of these defendants on matters relevant to their immunity defense.

III

The Gerdings then contend that even on the record before it, the district court erred in finding the French defendants immune to this action.

The first question in assessing an immunity defense under the FSIA is whether the particular defendants qualify as "foreign states" within the meaning of

28 U.S.C. § 1603. That statute provides in relevant part:

(a) A "foreign state," . . ., includes a political subdivision of a foreign state or any agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of

this title, nor created under the laws of any third country.

28 U.S.C. §1603. The district court concluded that all of the French defendants fit this definition of foreign state. The Gerdings point to nothing in the record before the court that suggests any error in the court's ruling on this threshold matter. Their only contention is that discovery might have uncovered information that would draw the ruling in question. But that possibility, as we have held in Part II, has simply been foreclosed by the Gerdings' own litigation strategy. We, therefore, affirm the court's conclusion on this threshold point.

The next issue is whether the foreign state defendant has immunity from suit in the United States courts. Under 28 U.S.C. § 1604,

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Thus a foreign state is immune under FSIA unless one of the exceptions is applicable. The Gerdings rely upon the "commercial activity" exception provided in §1605(a)(2) to avoid the French defendants' immunity defense. We conclude that the district court did not err in finding the exception not applicable.

At the outset, the Gerdings contend that the district court erred by placing upon them the burden of establishing subject matter jurisdiction, i.e., of

disproving immunity. They cite Gould, Inc. v. Pechiney Ugine Kuglmann, 853 F.2d 445, 451 n. 5 (6th Cir. 1988) in which the Sixth Circuit quoted the House of Representatives report on the FSIA, which provided:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state -- that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence

establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

Id. quoting H.R.Rep. No. 1487, 94th Cong. 2d Sess. 1, 17, reprinted in 1976 U.S.Code Cong. & Admin.News 6604, 6616. Although the district court may not have specifically mentioned this burden-shifting process, we think it was properly applied. Under that process, the French defendants' motion to dismiss with its attached declarations effectively shifted the burden to the Gerdings to identify materials of record showing that the defendants were not entitled to immunity, i.e., that the commercial activity exception did apply. The French defendants' motion with attachments actually went further than was required to carry their initial

production burden. Their attachments easily established prima facie that they fit the "foreign state" definition; they also showed prima facie why each of the exceptions in the FSIA was inapplicable. They need only have done the former. As the Fifth Circuit recently explained:

> [t]he party seeking immunity has no obligation to affirmatively eliminate all possible exceptions to sovereign immunity. Once a party demonstrates to the district court that it is a "foreign state" potentially entitled to immunity under the FSIA, the burden shifts to the opposing party to raise the exceptions to sovereign immunity and assert at least some facts that would establish the exceptions.

Stena Rederi AB v. Comision de Contratos del Comite, 923 F.2d 380, 390 n. 14 (5th Cir. 1991). Here, the issue on which immunity turned, whether the commercial activity exception applied to avoid the defense of immunity that had been prima facie established, was clearly

before the court by virtue of the French defendants' anticipatory avoidance of its application (along with that of all other exceptions), and the Gerdings' specific and sole reliance upon it in their opposition to the motion to dismiss. And on this dispositive issue, the defendants did have the ultimate burden of persuasion. We think the district court properly found, with due regard for the burden's cast, that on the record before it the commercial activity exception did not apply, hence that immunity was established.

That exception is expressed in §1605(a)(2):

(a) A foreign state shall not be immune from the jurisdiction or courts of the United States or of the States in any case--...

(2) in which the activity is based upon a commercial activity carried on in the United States by the foreign state;...

Sections 1603(d) and 1603(e) define "commercial activity" for the purposes of the FSIA:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having <u>substantial contact</u> with the United States.

28 U.S.C. §§ 1603(d), (e) (emphasis added). In addition to the express requirement that the commercial activity have "substantial contact" with the United States, the FSIA has been interpreted to also require a nexus between the commercial activity in the United States and the plaintiff's cause of action. Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 202 (5th Cir. 1984). We agree that this is implicit in the statute.

Applying these provisions, the district court concluded that on the undisputed facts of record before the court, the commercial activity of the French defendants in the United States upon which the Gerdings relied was so "isolated and transitory," that it did not meet either the substantial contact

or the nexus requirement. We can find no error in this determination.

The commercial activity relied on by the Gerdings included chef de mission Jean Genoux's attendance at the July, 1987 planning meeting in Morristown, New Jersey; the N/C Leon Thevenin's presence at the Wilmington, North Carolina port; the loading of cable onto the N/C Leon Thevenin at AT & T's facility in Newington, New Hampshire; and the N/C Leon Thevenin's presence at Port Covington, Maryland where it picked up AT & T engineers and a new French crew. The Gerdings also argue that the N/C Leon Thevenin must have entered into commercial contracts while it was docked at Wilmington and at other United States ports.

When the district court examined these contacts it found that the Gerdings

had not satisfied the due process "minimum contacts" standard, much less the FSIA's "substantial contacts" requirement. See Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988) ("We have previously held, moreover, that this substantial contact requirement is stricter than that suggested by a minimum contacts due process inquiry. . ."). The legislative history of the FSIA supports the district court's analysis. The House Report describes "substantial contact" as including cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States. . . and an indebtedness incurred by a foreign state which

negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States . . . H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., reprinted in 1976 U.S.Code Cong. & Admin.News 6604, 6615-16.

Here, Genoux's attendance at the New jersey meeting and the activities of the N/C Leon Thevenin were in furtherance of the ACMA and the particular mission that AT & T was undertaking for Spain's Telefonica. It was not the French defendants' commercial decision to use the N/C Leon Thevenin in the United States; rather the ship was in Wilmington only because that was the zone assigned to it by the ACMA. Genoux's attendance at the New Jersey meeting is insufficient to show substantial commercial activity

of the French defendants within the United States, because the meeting apparently concerning planning a mission by the ACMA to repair a Spanish cable on the high seas. The actual commercial activity being planned was not going to take place in the United States. As the District of Columbia Circuit recently held, "[n]othing in the legislative history suggests, however, that Congress intended jurisdiction under the first clause to be based upon acts that are not themselves commercial transactions, but that are mere precursors to commercial transactions." Zedan, 849 F.2d at 1513; see also Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1109 (D.C. Cir. 1982) (holding that two business meetings in the United States were not "more than 'transitory' and 'insubstantial' contact for purposes

of the Act [FSIA], . . . especially given their uncertain scope and importance").

Moreover, even if the Gerdings had satisfied the "substantial contact" requirement, they still would not be able to fulfill the FSIA's nexus requirement. As the Fifth Circuit recently explained,

> We do not suggest that the commercial activities exception requires a direct causal connection. . . . Nonetheless, the connection between the cause of action and the sovereign's commercial acts in the United States must be material. Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity.

Stena Rederi, 923 F.2d at 387 (citations omitted). The Gerdings contend that Genoux's attendance at the New Jersey meeting and his failure to ask for medical records of Bell Labs employees was directly connected to their cause of action against the French

defendants. However, the Gerdings can point to no matters of record suggesting that Genoux had any duty or obligation to ask for medical records at all, or that the New Jersey meeting would have been the place to ask for such records. Apparently, this meeting was held to plan the technical aspects of the upcoming mission. The Gerdings have not shown that this meeting had a material connection with Leslie Gerding's death.

In addition, the contacts that involve the N/C Leon Thevenin's presence in United States waters have no material connection with the Gerdings' cause of action. The Gerdings' case has nothing to do with the N/C Leon Thevenin's stops at ports in New Hampshire and Maryland to pick up equipment and crew. Even if the Gerdings could show that the N/C Leon Thevenin entered into numerous commercial

contracts while it was berthed at United States ports, these contracts would not have any connection to Leslie Gerding's death.

IV

In sum, we hold first that the Gerdings have not shown that their case presents the "exceptional circumstances" that warrant remand to the district court to allow pursuit of previously unsought discovery. And on the merits we conclude that on the record before it, the district court did not err in determining that the French defendants were entitled to immunity under the FSIA.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. WN-89-2874

CHRISTOPHER GERDING, Administrator
of the Estate of
LESLIE MARGARET GERDING,
et al

v.

REPUBLIC OF FRANCE, et al

MEMORANDUM

During the early hours of October 28, 1987, while on the high seas off the coast of Spain aboard the vessel T/C Leon Thevenin, Leslie Margaret Gerding ("Gerding") died from diabetic ketoacidosis. Plaintiffs, the survivors and heirs of Gerding, seek to hold liable several French national entities ("the French National Defendants"). For the reasons set forth below the French National defendants enjoy sovereign

immunity and thus, this Court lacks subject matter jurisdiction over the claims against them.

The complaint names as defendants the Republic of France, Ministere des Postes, des Telecommunications et de la Telediffusion (currently designated the Ministere des Postes, des Telecommunications et de l'Espace ("the Ministry"), the Direction des Telecommunications du Reseau Exterieur ("DTRE"), the Direction des Telecommunications Sous-Marines ("DTS"), France Cables et Radio ("FCR"), the Companie Francaise des Cables Sous-Marins (currently designated Compagnie Generales des Communications, S.A.) ("COGECOM"), and the N/C Leon Thevenin.[1] Pursuant to

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[1]Also named as defendants were AT&T/Bell Laboratories ("Bell Labs"), American Telephone & Telegraph Company ("AT&T") and Transoceanic Cable

(continued...)

Fed. R. Civ. P. 12(b)(1), (2), (3), (4) and (5), the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et. seq., the French National defendants move to dismiss the complaint. (Paper Number 24). An opposition and reply has been submitted. (Paper Numbers 29 and 31). After careful consideration, this Court finds that no hearing is necessary. Local Rule 105.6. For the reasons stated below, the motion to dismiss shall be granted.

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[1](...continued)
Ship Company. These claims reached a settlement consummated by the execution of a settlement agreement and joint tortfeasor release. At the time of settlement a motion for summary judgment was pending. (Paper Number 32). That motion is now moot. The remaining defendants are Claude Voiry, M.D. ("Dr. Voiry"), the ship's doctor, the Atlantic Cable Maintenance Association, and Compania Telefonica National de Espana, a/k/a CTNE ("Telefonica"). The record indicates that these defendants have yet to be served.

I. FACTUAL BACKGROUND

The genesis of this litigation began with AT&T's sale of a prototype undersea fiber optic deep water cable system, called Optican 1, to Compania Telefonica Nacional de Espana ("Telefonica") in 1983. The sales contract required AT&T to install and maintain Optican 1 between the Canary Islands. After its completion in 1985, Telefonica entered Optican 1 into the Atlantic Cable Maintenance Agreement ("ACMA"). The ACMA is a London-based unincorporated compact of governments and companies which own or repair cables in the Atlantic Ocean. Opposition at 1-Deposition of Henry M. Rickman, Exhibit B (Paper Number 29).[2] ACMA participants include Telefonica,

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[2]All references to exhibits refer to plaintiff's attachments to their opposition to AT&T's motion for summary judgment.

AT&T, France Telecom, and France Cables & Radio. ACMA functions as a maintenance related organization of "cable ships", each owned individually by various participants, that service the cable repair needs of any ACMA member. Each ACMA entity enters its cable into the registry of the organization. If an enrolled cable needs repair, any participant may request that ACMA's management Committee, chaired by Henry Rickman ("Rickman") of AT&T, assign the ship for repairs. The cable owner pays the operational costs of the cable ship performing the repair. The various cable ships are assigned "zones" in which they maintain a "standby" status until a repair mission is assigned.

Optican 1 failed upon its completion. An investigation disclosed that sharks were biting and damaging the cable. AT&T

asked its research and development organization, Bell Labs ("Bell Labs"), to develop and manufacture an armored Fish Bite Protected ("FBP") fiber optic cable. Among the Bell Labs personnel assigned to develop FBP was Leslie Gerding. Following the development of FBP, AT&T agreed to replace the existing Optican 1 cable with new FBP cable. Telefonica agreed to pay the costs associated with the use of the ACMA cable ship to install the FBP cable.

The ACMA assigned the French ship N/C Leon Thevenin as the ship to perform the repairs on the Optican 1 cable. The Leon Thevenin is owned wholly by the FCR and is designed and used solely for the maintenance and repair of undersea communications cable. The ship's captain is Jean Bonhomme, and Jean Genoux acted

as "Chef de Mission" during the Leon Thevenin Optican 1 mission.

In late July, 1987, AT&T's personnel in charge of the Optican 1 mission convened a meeting to discuss a plan for the mission. Genoux, acting as a representative of the Leon Thevenin, attended the meeting. In September, 1987, the ACMA released the Leon Thevenin from its "standby" status to the Optican 1 mission. The ship immediately sailed to New Hampshire to load the new FBP cable. From the New Hampshire port, the vessel traveled to Baltimore to load AT&T's and Bell Labs' testing equipment, engineers and splicers, and changed its French crew. Thereafter, the Leon Thevenin sailed for the Canary Islands.

Gerding boarded the vessel in late October, 1987, while anchored off the Canary Islands. Upon her arrival,

Gerding did not notify the captain, Chef de Mission or any other personnel that she suffered from diabetes. Her duties entailed the supervision of recovering and storing cable and implantation of the new cable. During the voyage, the vessel encountered severe inclement weather. By the evening of October 25, 1987, Gerding became quite seasick. Two days later, she was admitted to the ship's infirmary. Early the next morning, Gerding died.

Plaintiffs filed this matter asserting three causes of action: (1) a claim under the Jones Act, 46 U.S.C. §688 et seq.; (2) a claim for unseaworthiness; and (3) a claim under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761-768. The defendants subsequently moved to dismiss the complaint primarily asserting this

Court's lack of subject matter jurisdiction.[3]

II. MERITS

By enacting FSIA, Congress codified procedures for actions commenced against foreign states providing a comprehensive set of guidelines as to when and how parties may maintain an action against a foreign state in the courts of the United States and when a foreign state is entitled to sovereign immunity. H.R.

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[3]A motion to dismiss based on a claim of lack of subject matter jurisdiction may take one of two forms. The first attacks the complaint's failure to comply with Rule 8(a)(1), which means that the allegations are insufficient to show that the federal court has jurisdiction over the subject matter. The other method challenges the substantive allegations over the complaint arguing the court's actual lack of subject matter jurisdiction. In considering a Rule 12(b)(1) motion, the Complaint will be broadly and liberally construed. Fed. R. Civ. P. 8(f); Scheuer v. Rhodes, 416 U.S. 232 (1974). All allegations are to be assumed true. Nevertheless, the burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. hare v. Family Publication Service, Inc., 334 F. Supp. 953 (D.Md. 1971).

Rep. No. 1487, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code Cong. & Admin. News 6604.

Section 1330 of Title 28 of the United States Code, which governs subject matter and personal jurisdiction in actions against foreign states in the courts of the United States, states in relevant part:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as define din section 1603(a) of this title as to any claim or relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign shall exist as to every claim

> for relief over which the district courts have jurisdiction under subsection (a). . . .

28 U.S.C. § 1330 (1966) Supp. 1990). For original jurisdiction to exist, however, the claim against the foreign state must fall within an exception to the basic premise, set forth in 28 U.S.C. § 1604 (1982), that foreign states generally are immune from the jurisdiction of federal courts. Martin v. Republic of South Africa, 836 F.2d 91, 93 (2d Cir. 1987). Section 1604 of Title 28 states:

> Subject to existing international agreements to which the United States is a party of the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the states except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1604 (1972 Supp. 1990). For section 1604 to be applicable, the entity asserting immunity must be a "foreign state." That term is defined in 28 U.S.C. §1603(a) as follows:

> (a) A "foreign state,". . ., includes a political subdivision of a foreign state or any agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity --
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in

> section 1332(c) and (d) of this title, nor created under the laws of any third country.

Id. There is no dispute that the French National defendants are considered to be a "foreign state" under the FSIA definition.[4]

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[4]The Ministry is a unit of the French national Government responsible for France's mail, telecommunications, and satellite operations. The DTRE is an agency operating within the Ministry and, in turn, DTS is a subdivision of DTRE. The Ministry, DTRE and DTS have no operations, employees or property within the United States. Motion of defendants to dismiss, Exhibit B (Declaration of Marcel Roulet, Direction General of France Telecom)(Paper Number 24). Both FCR and COGECOM are known as societe anonyme, a corporation organized and existing under the laws of France. All but an infinitesimal percentage of FCR's shares are owned by the Republic of France through COGECOM. The sole function of COGECOM is to hold shares of certain companies on behalf of the French state. Neither does FCR or COGECOM maintain an office or place of business or conduct any activity in the United States related to the maintenance and repair of undersea telecommunications cable. Id. Exhibit C (Declaration of Michel Caillard, General Counsel of FCR) (Paper Number 24). The Leon Thevenin is owned by FCR and, thus, constitutes an instrumentality of France.

To pierce the sovereign immunity veil, a plaintiff bears the burden of demonstrating the applicability of the exceptions created to the general rule of immunity. The "exceptions" to the general rule of sovereign immunity are fully set forth in 28 U.S.C. § 1605(a). Plaintiffs' complaint fails to identify the basis or "exception" upon which this case relies. Nevertheless, in their response to the motion to dismiss, plaintiffs rely only on the "commercial activity" exception set for section 1605(a)(3)[1], which states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ---
>
> (2)[1] <u>in which the action is based upon a commercial activity carried on in the United States by the foreign state</u>; [2] or upon an act performed in the

> United States in connection with a commercial activity of the foreign state elsewhere; or [3] or upon an action outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (1972 Supp. 1990)(emphasis supplied). Sections 1603(d) & (e) of FSIA defines "commercial activity" as:

> (d) A "commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means

> commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1603(d) & (e) (1982). In addition to the requirement of "substantial contact" set forth in §1603(e), courts construing the applicability of § 1605(a)(2)[1] require proof of a "nexus" between the commercial activity of the defendant and the plaintiff's cause of action. The facts as presented, taken as true and construed in a light most favorable to the plaintiff, fail to establish either that the defendant's alleged commercial activity had "substantial contact" with the United States or that a sufficient "nexus" exists between that commercial activity and the plaintiff's claims.

1. Substantial Contact

In Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511 (D.C. Cir. 1988), the Court of Appeals for the District of Columbia discussed the degree of contact that would establish a substantial contact." Citing FSIA's legislative history, the court reviewed examples of substantial contact:

> [These include] cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605 (a)(5)), and in indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States -- for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. . . . This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Zedan, 849 F.2d at 1513 (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976), U.S. Code Cong. & Admin. News 1976 at 6604, 6615, 6616). The Court further stated, "[w]e have previously held, moreover, that this substantial contract requirement is stricter than that suggested by a minimum contacts due process inquiry, and that isolated or transitory contacts with the United States do not suffice." Zedan, 849 F.2d at 1512 (citing Maritime Int'l. Nominees Establishment v. Guinea, 693 F.2d 1094, 1109 (1982), cert. denied, 464 U.S. 815 91983). Other courts have recognized that the degree of contact required by the "substantial contact" requirement is greater than that which could suffice to support personal jurisdiction under a nono-FSIA constitutional due process standard. See e.g., Maritime Int'l.

Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-09 (D.C. Cir. 1982); Magnus Electronics, Inc. v. Argentine Republic, 637 F. Supp. 487, 493 (N.D. Ill. 1986), (citing Verlinden, B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1295-96 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2nd Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983)).

The plaintiffs contend that "the French National defendants established commercial activities, with substantial contact with the United States, when they: (1) agreed to provide the N/C Leon Thevenin to help AT&T/Bell Labs perform repairs at Telefonica's cable; ;(2) dispatched Chef de Mission Jean Genoux to Morristown, New Jersey, to attend the July 29-30, 1987 meetings convened and chaired by AT&T to discuss the cable

repairs; (3) dispatched its cable ship, the N/C Leon Thevenin to AT&T's depot in Wilmington, NORTH Carolina for an extended period so that the ship could wait in port as ACMA's West Zone "standby"; (4) accepted orders from AT&T sending the N/C Leon Thevenin from Wilmington to Newington, New Hampshire to load and store AT&T's cable; (5) permitted AT&T employees to board and inspect the N/C Leon Thevenin while it was in Newington to insure that the cable was properly taken aboard and stowed; (6) accepted orders from AT&T to sail from Newington to AT&T's Port Covington, Maryland depot; (7) docked at AT&T's Port Covington, Maryland depot and permitted AT&T employees to board for the journey to the Canary Islands; (8) changed French crews at AT&T's Port Covington depot; and (9) permitted AT&T employees to exert

very considerable control over the N/C Leon Thevenin on the trip to the Canary Islands and while the ship was performing AT&T's repairs between the Canary Islands." Opposition at 18-20 (Paper Number 29).

The nature of these "contacts" are both isolated and transitory. The agreement to allow the N/C Leon Thevenin to perform the cable repair on Telefonica's cable was made pursuant to the ACMA compact. The election of the N/C Leon Thevenin was not a part of a commercial enterprise undertaken by the French National defendants which entailed a substantial contact with this country. The purpose of the repair mission was to replace the Spanish cable off the Canary Islands. The fact that this mission required the N/C Leon Thevenin to travel to the United States to load cable, dock

in various state ports, and change its crews does not amount to substantial contact envisioned by Congress when enacting FSIA. Additionally, Genoux's participation in the technical meetings held and organized by AT&T does nothing further in establishing the requisite degree of contact. Simply put, the French National defendants' contacts with this forum do not establish the necessary predicate contacts required by FSIA, nor would they establish "minimum contacts" under a due process analysis. See e.g., Asahi Metal Ind. v. Superior Court of California, Solano County, 480 U.S. 102 (198&); World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958).

2. Nexus

Courts construing section 1605(a)(2)[1] have held that it "is

essential that there be a nexus between the plaintiff's grievance and the sovereign's commercial activity [in the United States]." Velidor v. L/P/G. BENGHAZI, 653 F.2d 812, 820 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982); accord America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 796 (9th Cir. 1989); Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 199-204 (5th Cir 1984). "The commercial activity relied on by [the plaintiff] to establish jurisdiction must be the activity upon which the lawsuit is based. The focus must be solely upon 'those specific acts that form the basis of the suit.'" America West, 877 F.2d at 796-97 (citation omitted; emphasis in original (quoting Joseph v. Office of the Consulate General, 830 F.2d 1019, 1023

(9th Cir. 1987), cert. denied, 485 U.S. 905 (1988)).

Plaintiffs claim that this "nexus" requirement is established by Genoux's attendance at the technical meetings held by AT&T. Under plaintiffs' theory, Genoux's failure during this meeting or at any time later, to require a medical check or exam of all AT&T personnel who were to report to the Leon Thevenin was a proximate cause in Gerding's death. This argument strains logic. The purpose of the June 1987 technical meetings was to review the plan as created and designed by AT&T for the replacement of the cable. Genoux's role at this meeting was to act simply as the liaison for the Leon Thevenin. There is no evidence to suggest that, if medical exams or the possibility thereof were discussed at this meeting, Gerding's death would not

have occurred. Indeed, it could be argued that Gerding's own failure to alert the ship's medical staff of her diabetic condition was perhaps a contributing cause to her death. Construing the facts as presented in a light most favorable to the plaintiffs, the Court finds that there exists no nexus, as required under FSIA, between their cause of action and the defendants' alleged commercial acts in this country.

III. CONCLUSION

For the reasons stated above,[5] the French National defendants enjoy sovereign immunity. Accordingly,

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[5]Since the Court finds that the necessary requirements underlying the applicability of the claimed exception in this case, 28 U.S.C. § 1605(a)(2)[1], have not been established, defendants' remaining arguments as to the deficiency of service of process and venue need not be addressed.

defendants' motion to dismiss shall be granted by separate order.

William M. Nickerson, /s/
William M. Nickerson
United States District Judge

Dated: October 25, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. WN-89-2874

CHRISTOPHER GERDING, Administrator
of the Estate of
LESLIE MARGARET GERDING,
et al

v.

REPUBLIC OF FRANCE, et al

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 25th day of October, 1990, by the United States District Court for the District of Maryland, ORDERED:

1. That the motion of defendants' to dismiss BE, and the same hereby IS, GRANTED;

2. That this case shall be entered as CLOSED;

3. That the Clerk of Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

William M. Nickerson, /s/
William M. Nickerson
United States District Judge

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

CHRISTOPHER GERDING, *et al.*,
Petitioners

v.

REPUBLIC OF FRANCE, *et al.*,
Respondents.

RELEVANT PROVISIONS OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

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§ 1603. Definitions

For purposes of this chapter --

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or

insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this

Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with

a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or

loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosection, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign State with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be

governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.